



READER'S queries



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: A young man came to me with request to buy his proportion of land property which his father would have got if he was alive. But his father died before his parents death. This person has 3 uncles and 4 aunts. His grandparents did not distribute their land property among their children during there life time. One thing is mentionable that his grand mother had blind affection to her youngest son. She declared during her lifetime that she will legally give all her property to the youngest son by 'heba' / gift or will. My questions are a) since his father died before his grand parents death, how he will sell his father's due share? b) In this situation can I buy his said portion of his grand mother's land property legally? c) His uncles and aunts will get their due share 2:1 as per rule. How much this boy will get? d) After purchasing that portion of land from him, if it is found that his grand mother gave her property to his youngest son by 'heba', will my purchase be illegal? e) Can the young man sell his portion of land by taking money form me writing on stamp paper; and will it be legal? f) what is the legal process to do 'heba' or 'will'? Please give legal advice on the above subject. **Mr. Jamil Ahmed,** Mirpur, Dhaka.

Your Advocate: Your query lacks information necessary for a specific legal opinion. The time of death of the grandparents of the person offering to sell land is crucial. Since you have used the term 'a young man' let us presume that his grandparents died after 1961. The year 1961 is important in the sense that if the proposed seller's grandparents had died before 15th July, 1961 he does not acquire any saleable interest in their property. Now that the young man offering for sale has lost his father before his grandparents and the grandparents presumably died after 15th of July 1961 he is entitled to inherit the share of the property of his deceased grandparent which his father would have inherited, if alive. Therefore, other things remaining the same, the young man has acquired right, title and interest in his grandparents' subsisting property so as to be competent to offer for sale and you can safely go for buying the same. But you must check the quantum of share he is entitled to.

So far as the question of gift by his grandmother is concerned, you will have to make sure whether really there was any such gift made by your proposed vendor's grandmother in favour of her youngest son. If you cannot make sure it would be advisable for you to go for buying land to the extent your vendor is entitled to his grandfather's property only. As for the transactions, there is legal procedure as to how the transactions of sale is documented. Law requires that the disposition should be effected by a deed of sale duly registered in the Sub-Registrar's office having jurisdiction to register the same.

As for the question of 'gift' and 'will' the accepted broader principles are- every Mohammedan of sound mind and not a minor may dispose of his property by gift. It is a transfer made immediately and without any exchange by one person to another and accepted by or on behalf of the latter. Gift may be made of the entire property to any person irrespective of relationship. But a will may be made of one third of the testator's property after meeting the funeral expenses and debts. And a will in favour of an heir is invalid unless other heirs consent to it after the demise of the testator. Under Mohammedan law both gift and will may be oral. For a valid gift there must be a declaration of gift by the donor, acceptance by the donee and delivery of possession to the donee. In case of will there is no particular form. A verbal declaration may constitute a will. But the intention of the testator to make a will must be clear and explicit. Regardless of the legal position the practices of oral gift or oral will are gradually being narrowed down with the passes of time and almost every single disposition of the kind now a days is being written and registered. Secular laws, of course, require a deed of gift above certain valuation to be registered. Gift and will are complicated subjects involving technical questions of law and if you really want to make a gift or will it is always advisable to consult a good civil lawyer.

FROM LAW DESK



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Star LAW report



Trial under section 302 of Penal Code

Conviction without hearing the accused is void

High Court Division
(Criminal Appellate Jurisdiction)
Criminal Appeal No. 2388 of 1997
Babu Khan
Vs
State
Mr. Justice Amirul Kabir Chowdhury
and Mr. Justice AFM Ali Asgar
Date of judgment: 30.06. 2003

Background

Amirul Kabir Chowdhury J: At the instance of the accused appellant this appeal has been directed against judgment and order dated 28-1-1986 passed by the learned Sessions Judge, Rajbari in Sessions Case No. 75 of 1985 convicting the accused appellant under section 302 of the Penal Code and sentencing him to imprisonment for life.

Prosecution case, in brief, is that on 20-9-1984 at night accused appellant Babu Khan entered the house of one Alauddin Khan and when it was detected he along with his wife caught hold of accused Babu Khan and then Babu Khan assaulted them indiscriminately with dagger and fled away. Jarina Khatun wife of Alauddin Khan could recognise Babu Khan in the light of Kupi bati and the victims Alauddin Khan and his wife were taken to hospital for treatment. Alauddin Khan on 22-9-1984 succumbed to the injuries and out of the occurrence one Abdur Rajjak, neighbour of the victims, lodged the First Information Report on 21-9-1984. After investigation the police submitted charge-sheet against the accused appellant Babu Khan on 2-11-1984 under sections 380/511/459/326/302 of the Penal Code and that the case was sent to the Court of Sessions for trial. The learned Sessions Judge on 7-11-1986 framed charge against the accused appellant under sections 302/326 of the Penal Code in his absence and by the impugned judgment and order convicted the appellant.

Deliberation

In support of the appeal the learned Advocate for the accused appellant has taken us through the order sheets of the Court below and also the impugned judgment. He submits that the accused appellant has been charged and tried under sections 302/326 of the Penal Code and has been accordingly convicted under section 302 of the Penal Code. He also submits that the accused admittedly being in abscondence ought to have been defended by a lawyer at the cost of the State under Chapter XII of the Legal Remembrance Manual. There being no such appointment of any lawyer at the trial from the beginning which is absolutely illegal. Hence, the impugned judgment and order cannot sustain in the eye of law. He further submits that the accused appellant was not aware of the proceeding or of the impugned judgment and that being arrested on 29-4-1995 he came to know about the judgment for the first time and got the appeal filed. The learned advocate further submits that there is no cogent evidence to warrant conviction against the accused appellant and, as such, the appeal may be allowed acquitting the accused-appellant.

The learned Deputy Attorney-General, submits that every accused charged under section 302 of the Penal Code punishable with death has got right to be defended by a lawyer and the abscondence of accused, if any, should not

deprive him of such chance to be represented by a lawyer. In this view of the matter, the learned Deputy Attorney-General finds it difficult to support the impugned judgment and order since from the record it is apparent that the accused was not represented by any lawyer at any stage of the trial.

We have considered the submissions made at the Bar and perused the materials on record. Rule 1 of Chapter XII of the Legal Remembrance's Manual, 1960 reads as follows:

"1. Pauper accused punishable with capital sentence to be given legal assistance -- every person charged with committing an offence punishable with death, shall have legal assistance at his trial and the Court should provide advocate or pleaders for the defence unless they certify that the accused can afford to do so."

It is thus provided that every person charged with committing any offence punishable with death shall have to be given legal assistance at his trial. Under section 340 of the Code of Criminal Procedure and Article 33 of our Constitution the right to consult and to be

and the resultant conviction and sentence would be vitiated."

In agreement with the principles of law laid down above and in consonance with section 340 of the Code of Criminal Procedure, and Rule 1 of Chapter XII of the Legal Remembrance's Manual we hold that right of an accused to be defended by a lawyer in a case charged under section 302 of the Penal Code, being punishable with death, is an inalienable right guaranteed in the law of our land and if any trial takes place in refusing such fundamental right, the trial is a misnomer and the judgment passed in such trial convicting an accused is no judgement in the eye of law.

Decision

On perusal of Order No.1 dated 12-11-1985 and Order No. 4 dated 7-1-1986 it appears that the learned Sessions Judge himself found that the accused was absconding and by Order No. 4 he framed charge against the absconding accused under sections 302/326 of the Penal Code. Section 302 of the Penal Code prescribes capital



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defended by a legal practitioner has been guaranteed. In this connection the decision in the case of State Vs Imdad Ali Bepary in 36 DLR 333 may be referred to wherein their Lordships held "In this case it appears that no lawyer on behalf of the accused was present in Court. As such, the Court below before proceeding with the case ought to have appointed an Advocate to defend the accused. In that view of the said illegality the conviction and sentence of the condemned prisoner under section 302 is not maintainable and therefore set aside and the case is sent back for re-trial to the court below after appointing an Advocate to represent the accused and give him a chance to cross-examine the witnesses adduced in the case."

In another decision in the case of Mobarak Ali (Md) alias Mobarak Ali Mondal Vs People's Republic of Bangladesh, represented by the Secretary Ministry of Home Affairs in 50 DLR 10, it has been observed "We hold that the requirement of law is that irrespective of whether the accused is absconding or not he is as of right entitled to be represented and defended by a lawyer appointed by the court and the trial Court must ensure that it has been done before the commencement of the trial or else the trial

punishment and, as such, we are of the view that it was the duty of the learned Sessions Judge to take step or himself appoint a competent Advocate to represent the absconding accused. Failure of the learned Judge to make such appointment and arrange defence of the accused through a lawyer has vitiated the entire trial and, as such, the impugned judgment and order complained of cannot be maintainable.

In view of our discussion made above we find substance in the submission made by the learned Advocate appearing for the appellant. Since we decide to send the case on remand for fresh trial according to law, we do not like to make any comment at this stage as to merits of the case. On the reasoning aforesaid the appeal succeeds. The appeal is allowed. The impugned judgment and order dated 28-1-1986 passed by the learned Session Judge, Rajbari in Sessions Case No. 75 of 1985 convicting the accused appellant under section 302 of the Penal Code is set aside. The case is sent back to the learned Sessions Judge, Rajbari for fresh trial in accordance with law.

Advocate Md. Ashraf-uz-Zaman Khan and Advocate Md. Rezaul Haque for the Appellant. Golam Kibria, Deputy Attorney-General with Md Ferozur Rahman, Assistant Attorney-General for the State.



LAW letter

Will new dress bring any change?



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Recently the government has introduced new dress for Bangladesh Police. In her address to the police force on the opening day of Police week, the Prime Minister asked the police member to perform their duty properly. She also hoped that with the new dress, police will be able to change their image. I think the PM is too optimistic. Without solving the fundamental problems, we cannot expect the police to discharge their duty properly. We all know, general people no longer treat police as their friend. Rather, they are afraid of police and always tries to keep themselves away from police. But why? Few days back, high police officials of Dhaka Metropolitan Police pointed out their problems and limitations to the State Minister for Home. They raised

various issues which hinders smooth functioning of police. I am not opposing the government's decision, but my point is why don't you take appropriate steps to ameliorate the existing problems of the police? The change of dress will bring no good if the attitude and behaviour of police is not changed. **Jahangir Alam,** Tolarbagh, Mirpur, Dhaka.

Recently the dress-up of police has been changed. Changing dress-up of police is not an important event for the people. What is important is that the police should take a lenient view towards the mass. They will have to regain their past image. Now the people no longer deem police as their friend. They are (police) considered as lackey of

political govt instead. Albeit the bulk of police is well-mannered, gentle and a wee bit amicable, the remains are a culprit one. Besides, every consecutive govt uses police for serving its political purpose. For all intent and purpose, the real power of police has been shorn of by our politics. To revamp police and stir its activities, this condition of police is to be ameliorated in the first place.

In a country with approximately 135 million people, the police/people ratio is very poor. Apart from its disproportion ratio, vintage weapons, hoary past mindset and political clout have make the situation even worse. To make the situation better, parochial attitude of the political high-ups is to be annihilated. Strict training procedure must be pur-

sued with a regular basis. The last but not the least, nepotism, illegal appointment and political intervention, if, are stopped, only then we expect our police will work according to our expectation.

Aminul Islam, Student of Economics, Dhaka University.

Legal Aid Fund needs more publicity

There are 61 legal aid committees in 61 Districts chaired by Deputy Commissioner. Poor people can seek financial assistance for litigation from the fund. Around eight thousand cases have been filed through the financial help provided by this fund. Introduction of legal aid fund by the government is undoubtedly a praiseworthy step.

Unfortunately, legal aid fund lacks publicity that hinders proper application of it as litigants are mostly illiterate and unconscious about their legal rights. Consequently, existence of this fund remains unknown to them. Moreover, process of proving someone eligible to get assistance form this fund is not easy and friendly one. Taking the above problems into account, the government should not only ensure publicity of the fund, but also proper distribution of the aid. NGO's and other social institutions can be involved to raise awareness among the poor people to make best use of the legal aid fund.

Al Amin Sagar, Dhaka University.

LAW week



Judicial service commission drafted

The government has finalised a draft of the body for recruiting judges for lower courts. The draft will be submitted to Prime Minister Khaleda Zia in a couple of days and President will promulgate rules to form the commission after her approval. Seven members -- an Appellate Division judge, a Public Service Commission member, the law, establishment and finance secretaries, registrar of the Supreme Court and Dhaka district and session's judge -- will sit on the committee. The government is forming this body in line with the 12 point directive issued by the Appellate Division of the Supreme Court to separate the judiciary from the executive. -Law Desk.

Amendment to Copyright Act okayed

The cabinet has approved amendment to the Copyright Act 2000. The amendment is aiming to preserve national interest in international trade in the perspective of globalisation as well as attract adequate foreign investment in the country. The approval was given at the weekly cabinet meeting with Prime Minister Khaleda Zia in the chair at her office. The Cabinet also approved the draft of the State Acquisition and Tenancy (Amendment) Act 2004 providing for the formation of special tribunal to settle land record and survey-related cases. -Observer, 20 January.

Backlog of cases in PDB courts

The 16-year-old litigation system of the Power Development Board (PDB), is bogged down with over 60,000 pending cases. Sixteen PDB courts, formed exclusively to deal with cases over outstanding bills filed under the Electricity Act, 1910, have been falling far short of their target and purpose. Under this law, a person found guilty can be sentenced to imprisonment or fined or both. These PDB courts can clear 14,000 cases a year at most, but every year there are about 4,000 to 5,000 more cases that they are unable to resolve. As a result, there were 43,000 cases pending with the PDB courts in 1999-2000. Most of the pending cases are shelved in Chittagong North and South courts of the PDB. -Daily Star, 20 January.

Detention of 13 Indians challenged

The High Court Division of the Supreme Court has issued a rule upon the government to show cause why the detention of 13 Indian nationals should not be declared unlawful. The rule has been made returnable within two weeks. The Indian citizens had already served out their term in prison. ful. The also asked the government to explain why other similarly incarcerated persons should not be released forthwith. The order came upon a public interest litigation writ filed by Bangladesh Legal Aid and Services Trust (Blast) challenging the "unlawful detention" in prison of the Indian nationals after the expiry of their sentence awarded by Rajshahi District and Sessions Judge's Court two and a half years ago. -Law Desk.

Watchdog to curb cop corruption

Government is considering setting up an intelligence force to check crimes in the police force. Home Minister Altaf Hossain Chowdhury informed the Jatiya Sangsad. But the minister did not specify how soon the new force would be set up. Replying to a separate query, Altaf said the government has allowed hawkers to sit and run their business on several city footpaths. He said policemen are assigned to patrol and ensure that people are not robbed in those busy roadside makeshift markets. Bangladesh Nationalist Party lawmaker Monjur Kader raised the question about hawkers occupying some important city pavements at Motijheel, Gulistan and Baitul Mukarram areas and expressed concern at frequent incidents of pickpocket there. -Daily Star, 22 January.

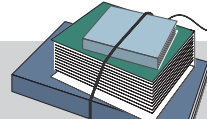
AD cancels bail of Khwaja Habib

The Appellate Division of the Supreme Court has stayed the High Court order granting bail to two Khwaja Habibullah Habib, a ward commissioner of Dhaka City Corporation. Khwaja Habib, sentenced to 27-year imprisonment in an arms case, was granted bail two months ago after 17 weeks of the conviction. The Appellate Division asked the convict to surrender before the lower court in two weeks. The order came upon petition filed by the government, seeking stay of the High Court orders granting him bail. The Appellate Division also asked the government to come up with regular leave petition for hearing of the cases. Additional Attorney General Abdur Rezzak Khan appeared for the state. -Ittefaq, 21 January.

5,585 Bangladeshis languishing in foreign jails

A total of 5,585 Bangladeshis are languishing in the prisons of 38 countries all over the world. At the same time, 713 foreigners are stuck in Bangladesh jails even after completing their various terms, unable to leave due to monetary constraints or for the lack of proper documentation. A total of 239 foreigners have been released on bail in the last year. Of them, two have been sent back to neighbouring countries, 27 are with their guarantors and eight are absconding. The deputy commissioners concerned do not know the whereabouts of the other 202. Of the 5,585 Bangladeshi prisoners abroad, 1,584 are in Indian jails. This was revealed during a meeting of the cabinet committee on jail reforms. The cabinet committee asked the foreign ministry to direct the Bangladesh missions concerned to arrange legal aid for the Bangladeshis languishing in foreign prisons through legal aid organisations working in the respective countries. The committee also decided to visit Dhaka Central Jail next month. The meeting was told that 141 under-trial foreign prisoners in Bangladesh had been provided legal aid in the last one year and the cases against 37 of those foreigners had been rejected. -New Age, 22 January.

LAW lexicon



Plea bargaining

Negotiations during a criminal trial, between an accused person and a prosecutor in which the accused agrees to admit to a crime (sometimes a lesser crime than the one set out in the original charge), avoiding the expense of a public trial, in exchange for which the prosecutor agrees to ask for a more lenient sentence than would have been recommended if the case had of proceeded to full trial. The normal rule of law is that judges are not bound by plea bargains although, as past lawyers themselves, they are generally aware of plea bargains and a reasonable recommendation of a prosecutor on sentencing is always heavily considered.

Pleadings

That part of a party's case in which he or she formally sets out the facts and legal arguments which support that party's position. Pleadings can be in writing or they can be made verbally to a court, during the trial.

Polygraph

A lie-detector machine which records even the slightest variation in blood pressure, body temperature and respiration as questions are put to, and answers elicited from a subject.

Postal rule

A rule of contract law that makes an exception to the general rule that an acceptance is only created when communicated directly to the offeror. An acceptance is binding and the contract is said to be perfected when the acceptor places this acceptance in the mail box for return mail even if, in fact, it never reaches the offeror. An 1892 British case summarised it as follows: "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

Corresponding Law Desk

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